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No. 89-74

In the Supreme Court of the United States

OCTOBER TERM, 1989

DOROTHY L. NOBLE, PETITIONER

v.

JAMES D. WATKINS, SECRETARY,
UNITED STATES DEPARTMENT OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was prejudiced when the district court, on the basis of the unchallenged findings of an EEOC examiner that petitioner sought to enforce, granted her motion for summary judgment on her claim that her co-workers had retaliated against her for filing a sex discrimination claim without further ruling on her reprisal contentions.

2. Whether the district court and the court of appeals correctly denied petitioner's constructive discharge claim.

3. Whether the district court's award of attorney's fees, which reflected petitioner's limited success, was proper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1D-7D) is unreported. The opinion of the district court (Pet. App. 1C-54C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1989. A petition for rehearing was denied on April 17, 1989. The petition for a writ of certiorari was filed on July 17, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was a GS-13 Publications and Marketing Specialist for the Department of Energy (DOE). In 1981, after an EEO Counselor had failed to resolve to her satisfaction her allegations that she had been discriminated against on the basis of sex, she filed a complaint with the Equal Employment Opportunity Commission (EEOC). In addition to claiming that she had suffered from sex discrimination, petitioner alleged that other employees had retaliated against her because she had complained to the EEOC Counselor.

After conducting a hearing at which 24 witnesses testified, the EEOC examiner rejected petitioner's claims that she had suffered from discrimination. With respect to her claim that her supervisor admonished her especially harshly about her failure to meet deadlines, the examiner found that petitioner "has failed to show with respect to admonishments that she was treated differently from her male coworkers." Pet. App. 29A-30A. The examiner similarly concluded that there was no merit to her contentions that she had been denied desirable assignments or supervisory training. *Id.* at 30A-34A.

The examiner did conclude, however, that there was merit to her claim that she had suffered reprisals. Specifically, the examiner found that her co-workers had improperly signed an open letter stating that they were aware of her complaints and thought they were unfounded. Pet. App. 38A-39A. The examiner also noted that her co-workers had played "tricks" on her, such as removing her nameplate from her desk and placing it on the door to the copy room. *Id.* at 40A. However, the examiner found, contrary to petitioner's contention, that grievances filed by some

of the employees she supervised had not been brought to harass her, but were "legitimate in view of [petitioner's] failure to perform her responsibilities." *Id.* at 42A. The examiner further found that, while her co-workers had attempted to force her to drop her charges of discrimination, there was no merit to her claim that her retirement had been caused by the actions of her co-workers so that she was, in effect, constructively discharged. *Id.* at 47A-48A. The examiner ordered DOE to "educate those employees who harassed [petitioner] on their responsibility not to abuse either the grievance/arbitration machinery or the employment discrimination process." *Id.* at 50A.

Petitioner then filed suit in district court. Shortly before trial, she moved for summary judgment on her reprisal claim because DOE had not appealed. After trial, the court granted her motion, but added that she could not seek to "rest on an already adjudicated finding of reprisal *and* to obtain additional relief based on a reappraisal of the portions of her reprisal claims that were rejected at the administrative level." Pet. App. 13C. The court ordered DOE to "establish a training and counseling program for all its managers and supervisory personnel to the end that no further retaliatory actions will take place against its employees." *Id.* at 52C.

The court next rejected petitioner's sex discrimination claim. The court concluded that the evidence showed that petitioner "was a notably uncooperative worker who refused to assume responsibilities expected from a professional of her rank and tenure." Pet. App. 29C. "Time and again, [petitioner] failed to meet deadlines for submission of her work, and time and again she failed to offer any acceptable ex-

planation for her poor performance." *Ibid.* Moreover, the court added, petitioner's "relationships with superiors, colleagues, and subordinates were racked with conflict." *Id.* at 30C. The court concluded that she had been "an inept and unsatisfactory manager and worker who brought whatever difficulties she experienced upon herself." *Id.* at 32C.

The court also rejected her constructive discharge claim. Citing *Clark* v. *Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981), the court stated that "[t]o sustain a constructive discharge claim, [petitioner] must show that her employer intentionally made her working conditions so intolerable that a reasonable person would be forced to resign." Pet. App. 35C. The court found that her supervisors had moved promptly to stop the "tricks" played by her co-workers once she reported them and that she resigned more than a year after they ceased. *Id.* at 37C n.9, 39C. It concluded that "the evidence clearly shows that [petitioner] was not 'forced' to resign but welcomed the opportunity to take early retirement." *Id.* at 40C.

The court of appeals summarily affirmed, holding that "the district court's factual findings are not clearly erroneous." Pet. App. 2D.

ARGUMENT

Petitioner first claims (Pet. 18-23) that, by granting her motion for summary judgment on her reprisal claim, the district court denied her right to de novo review of the reprisal claim. Review is not warranted to consider this contention. As an initial matter, it does not seem unfair to hold that petitioner could not both enforce and challenge the examiner's findings with respect to the reprisal issue. In any event, she was not prejudiced. Because her motion for summary

judgment was filed shortly before trial, the court did not act on it until after it had heard all the evidence. Pet. App. 13C. It then noted that it would consider the reprisal evidence insofar as it was relevant to her constructive discharge and sex discrimination claims, since petitioner contended that the evidence was relevant to those claims. *Id.* at 14C n.4. Because the court found in petitioner's favor on her reprisal claim and considered all the evidence of reprisal that she presented in considering her other claims, there is no merit to her complaint that she was prejudicially denied de novo review.

Petitioner next contends (Pet. 23-27) that the district court erred in its treatment of her constructive discharge claim. Specifically, she contends that the court misapplied *Clark* v. *Marsh*, which, petitioner states, ruled that the standard to be applied to such claims is "whether the employer deliberately made working conditions so intolerable as to drive the employee into an 'involuntary quit.'" Pet. 25. According to petitioner, the district court departed from this standard when it stated that petitioner had to "show that her employer intentionally made her working conditions so intolerable that a reasonable person would be forced to resign." Pet. App. 35C. But whatever differences there may be between the court of appeals' statement of the rule and the district court's phrasing of the standard (and petitioner suggests none), they surely made no difference here, where the district court concluded that petitioner welcomed the opportunity to take early retirement. *Id.* at 40C.

Finally, petitioner argues (Pet. 27-28) that she should have been awarded attorneys' fees because she presented "colorable" claims. As an initial matter,

attorneys' fees are not warranted under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) merely because a plaintiff presented a colorable claim; the plaintiff must prevail. *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 & n.7 (1983). Moreover, it should be noted that petitioner was awarded more than $46,000 in attorneys' fees by the district court.* In light of petitioner's limited success, that award was generous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

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* Petitioner included an interim order of the district court denying attorneys' fees in the appendix to her petition (Pet. App. B), but not the order awarding fees. We have lodged a copy of that order with the Clerk of the Court.

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